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## BOOK REVIEW

### Beyond Observable Prejudice — Moving from Recognition of Differences to Feasible Solutions: A Critique of Ian Ayres' *Pervasive Prejudice*?

MARY MARGARET PENROSE\*

As a female professor working within the academic ranks of a law school, I did not have to read Ian Ayres' work, *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination*,<sup>1</sup> to know that the odds remain quite high that blacks and women will be subjected to greater instances of discrimination in the marketplace, in medical facilities, and in judicial proceedings than their white male counterparts. Although I would not suggest that such conclusion is axiomatic, it certainly is observable on an experiential level by those falling within the two categories (race and gender) discussed in Professor Ayres' book. Perhaps the greatest contribution of *Pervasive Prejudice* is that it reminds us that the civil rights laws meant to protect women and minorities are still not fulfilling their promise.<sup>2</sup>

Professor Ayres' writing underscores the fact that any legal challenge taken to a court in the United States system — state or federal — will likely result in the case being brought up before a white male.<sup>3</sup> Likewise, the lawmakers we rely on to protect us from blatant and tacit discrimination alike are, in overwhelming number, white males.<sup>4</sup> And, finally, when a black man or any female is in need of medical

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1. IAN AYRES, *PERVASIVE PREJUDICE: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001). Mr. Ayres is currently the William K. Townsend Professor of Law at Yale Law School.

2. The major legal protections afforded minorities via federal statute include the Civil Rights Act of 1964 (particularly Title VII which prohibits purposeful discrimination in employment decisions based on race, color, religion, gender, or national origin), the Civil Rights Act of 1968, the Voting Rights Act of 1965, 42 U.S.C. §§ 2000a-2000h-6, 42 U.S.C. § 1981, 42 U.S.C. § 1982 and Title IX.

3. The composition of the U.S. Supreme Court certainly does not reflect the gender breakdown in society. Currently, there are only two women sitting on the U.S. Supreme Court — Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg. In addition, there is only one person of color on the Court — Justice Clarence Thomas. These numbers, from a statistical perspective, are not greatly out of sync with the U.S. court system at large, both at the trial and appellate levels.

4. In the 107th Congress, there were seventy-four women — sixty-one female Representatives in the House of Representatives and thirteen female Senators. There are thirty-eight African Americans in

care, such as organ transplantation, the chances are great that the surgeon performing the procedure will be a white male.<sup>5</sup> Despite decades of legal protection via statutes and regulations, white men continue to be the power brokers in American society. Thus, the question mark at the end of Professor Ayres' extensive work, *Pervasive Prejudice?*, appears to be misplaced. The title, and the work itself, should unambiguously state what the empirical evidence presented seems to suggest — that prejudice and discrimination remain constant in American society.

The most distressing component of reading Professor Ayres' book is facing the numeric support and statistical evidence that represents a daily experience for many Americans.<sup>6</sup> Black men know, on a personal level, that the laws protecting minorities are impotent. Similarly, women — whose legal protections often come forty to fifty years *after* laws enshrined to protect black men<sup>7</sup> or whose protections stem from a pathetic byproduct of attempts to undermine racial protections<sup>8</sup> —

the House of Representatives with no African American representation in the Senate. Likewise, there are twenty-one Hispanic individuals representing our country in the House of Representatives with no Hispanic representation in the Senate. There are eight Asians and Pacific Islanders in the Congress — six members in the House of Representative and two in the Senate. And, finally, there are two Native Americans in Congress — one in the House of Representatives and one in the Senate.

5. A wonderful book detailing issues of gender discrimination in the medical profession is *Walking Out on the Boys*, written by Stanford Medical Professor Dr. Francis K. Conley. This work catalogues the countless instances of male-dominance in medical training and suggests that women are systematically dissuaded from entering the surgical specialties in medicine. See generally FRANCIS K. CONLEY, *WALKING OUT ON THE BOYS* (1999).

6. Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001). The author states:

Targeting African Americans for different treatment in retail settings is not unusual or rare. Slightings and differential treatment that are racial in nature occur frequently, if not every day, for African Americans. The daily assaults of racism become an integral part of the lives of African Americans. Nor is the phenomenon limited to particular groups or classes of African Americans. All African American shoppers are potential targets of everyday racism, such as consumer discrimination.

*Id.* at 276.

7. Black males received the right to vote under Constitutional guarantee in 1870. U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). Women, however, waited fifty additional years before their right to vote was constitutionally protected via the Nineteenth Amendment. In 1920, women were assured that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX. And, although members of racial minorities are expressly entitled to "equal protection" under the Fourteenth Amendment of the United States Constitution, women were denied the opportunity to have an Equal Rights Amendment, based solely on gender, included in the U.S. Constitution.

8. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). These cases provide a near-contemporaneous interpretation of the Fourteenth Amendment Equal Protection Clause and firmly held that the provisions of the Fourteenth Amendment were intended to respond to the racial inequities then existing in American society. The Court's interpretation of the Equal Protection Clause, at this time, did not extend to anyone outside the black race. Its provisions, at this interpretive stage, when viewed under the original, intended meaning certainly did not include women as a protected class. Similarly, *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1880), exclaimed that the Fourteenth Amendment was "designed to assure to the colored race the enjoyment of all civil rights that under the law are enjoyed by white

instinctively know that the statistical data, when properly compiled, will bear out the obvious fact that the original impetus for minority-based legislation, invidious structural discrimination against minorities, exists even in the twenty-first century. Perhaps no laws will ever, or could ever, eradicate the underlying desire of those in positions of power and prestige, usually white males, to dominate and discriminate against those lacking the same luxuries of power.

Why does prejudice remain pervasive in this country? Could it really be gleaned from something as simplistic as the demand side of economics, i.e., car sales to minorities, organ transplants for black citizens, and bail hearings involving minorities? Or, is it perhaps more pertinent to observe the shortcomings from the vantage point of supply-side economics, i.e., the predominate number of white males in decision-making positions that affect the minority population.

It is statistically accurate to observe that there are more white male business owners than their black and female counterparts.<sup>9</sup> Thus, the litigation surrounding "affirmative action" remedies continues to plague our judicial system as white males complain that they should not bear the historical remnants of a society whose legal and financial structure has perpetually provided them greater opportunities than women or minorities.<sup>10</sup> It is also statistically accurate to note that there are more white men in the upper echelon of education — particularly in legal<sup>11</sup> and medical

persons, and to give to that race the protection of the General Government."

9. Only nine of the Fortune 500 companies appear to be chaired by women or persons of color. See *Where Are All the Women?*, FORTUNE.COM, at [http://www.fortune.com/lists/F500/500\\_women.html](http://www.fortune.com/lists/F500/500_women.html) (Apr. 15, 2002); Nelson D. Schwartz, *What's in the Card for Amex?*, FORTUNE, Jan. 22, 2001, at 58. The most recent statistical breakdown shows that six women head companies in the Fortune 500, while only three companies are chaired by African Americans. See *Where Are All the Women?*, *supra*; Schwartz, *supra*. The three companies listing black CEOs include American Express (Ken Chenault), Fannie-Mae (Franklin Raines), and Avis (A. Barry Rand). See Schwartz, *supra*. In the Fortune 1000, women head eleven businesses. See *Where Are All the Women?*, *supra*. These businesses include the following: Charming Shoppes, Hewlett-Packard Company, Mirant, Spherion, Avon Products, Inc., Quintiles Transnational, Truserv, Xerox, Software Spectrum, Lucent, and Golden West Financial Corporation. See *The 2002 Fortune 500: Women CEOs*, FORTUNE.COM, at [http://www.fortune.com/lists/F500/500\\_ceo\\_women.html](http://www.fortune.com/lists/F500/500_ceo_women.html) (Apr. 15, 2002).

10. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

11. In the 2000-2001 edition of the American Association of Law Schools (AALS) Statistical Report on Law School Faculty, it becomes obvious that there remains significant under-representation of women and minorities on law faculties. Of the 184 current law school deans, only 12.5 % (twenty-three deans) are women while only 8.1% (fourteen deans) are persons of color. The percentages decrease when we isolate the number of female minority candidates, as only 1.2% of law school deanships are occupied by women of color. See RICHARD A. WHITE, ASSOCIATION OF AMERICAN LAW SCHOOLS STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS tpls. 1A, 2A, 2B (2000-2001), at <http://www.aals.org/statistics/index/html> (Apr. 15, 2002).

One disconcerting observation that can be gleaned from the AALS Statistical Report is that while the numbers for female deans are increasing (e.g., in 1995-96 there were only fifteen female deans), the number of persons of color serving as deans has decreased (down from seventeen in 1995-96 to fourteen currently). The numbers for full professorships are similarly deficient at reporting law schools. *Id.*

Of full professorships reported in 2000-2001, only 22.9% were held by women while only 11.4% were held by racial minorities. These slight figures should be contrasted with the stark figures showing

education.<sup>12</sup> The practical results of this observation include that more white males remain judges, law school deans, surgeons, professors, and, even, coaches than their black and female counterparts.<sup>13</sup>

Professor Ayres spends four of the first five chapters proffering complicated statistics and graphs that illustrate an obvious point: blacks and women entering businesses in the general marketplace will find the powerful positions in the majority of those businesses filled by white men.<sup>14</sup> Accordingly, black and female consumers are likely to receive a less attractive "deal" when negotiating or bargaining for goods. Professor Ayres' evidence is that black men, white women, and black women received less attractive car offers than white males when shopping at dealerships in the Chicago area.<sup>15</sup> This study, as presented, is contrasted to other efforts that considered a nationwide car-buying study<sup>16</sup> and one study completed

that women are the most significant component of "lecturers and instructors" at 66.1%, while minorities account for only 12.2% of occupants in this same position. White men, in contrast, represent 80.8% of all deanships at reporting law schools and 68.9% of all full professorships. Only 31.6% of "lecturers and instructors" positions are occupied by white men. *Id.*

See also Celia Wells, *Ladies in Waiting: The Women Law Professors' Story*, 23 SYDNEY L. REV. 167 (2001) (noting the pervasive nature of gender discrimination in legal academia).

12. In comparison with legal education, the figures for medical academia are as follows:

Of the 92,375 reporting faculty in U.S. medical schools, 2745 self-report as black. Of the 65,912 male deans and professors reporting, 1545 are black. And, of the 26,422 females reporting, 1199 self-report as black females. See AAMC — Association of American Medical Colleges, at <http://www.aamc.org> (last visited June 20, 2002).

13. Despite the fact that Congress passed Title IX, 20 U.S.C. § 1681 in 1972 to support and encourage more participation in athletics by females, much of the athletic community remains dominated by men — particularly white men. The Women's National Basketball Association has sixteen teams, only five of which maintain a female head coach. See Monica Lewis, *Female Coaches Becoming Rare Breed in WNBA*, ESPN.COM, at <http://www.espn.go.com/wnba/s/2000/0901/715926.htm> (last visited Aug. 7, 2002). Similarly, the Women's United Soccer Association (WUSA), the women's professional soccer league, maintains only one female head coach. *Full Coach List*, WUSA.COM, at [http://www.wusa.com/players\\_coaches/coach](http://www.wusa.com/players_coaches/coach) (last visited Aug. 7, 2002). The Ladies' Professional Golf Association (LPGA) is even chaired by a male attorney, Ty M. Votaw. *About...the LPGA*, LPGA.COM, at [http://lpga.com/utility/index.cfm?cont\\_id=38893](http://lpga.com/utility/index.cfm?cont_id=38893) (last visited Aug. 7, 2002). Although there may be many justifications for these limited participatory numbers by females, these numbers starkly contrast those of male professional sports. There are no female coaches in the professional ranks of basketball, football, soccer, or baseball. See *NBA Coaches Directory*, NBA.COM, at <http://www.nba.com/coaches> (last visited Aug. 7, 2002); *Coaches Club*, NFL.COM, at <http://www.nfl.com/coachesclub> (last visited Aug. 7, 2002); *2002 MLS Teams*, MLSNET.COM, at <http://mlsnet.com/teams> (last visited Aug. 7, 2002); *Major League Baseball Teams*, MLB.COM, at [http://mlb.mlb.com/NASApp/mlb/mlb/team/mlb\\_team\\_index.jsp](http://mlb.mlb.com/NASApp/mlb/mlb/team/mlb_team_index.jsp) (last visited Aug. 7, 2002). And, the male professional golf association, the PGA, is headed by a male. *Finchem Named Recipient of Distinguished Service Award*, PGA.COM, at [http://site.pga.com/newsline/industry\\_news/industrynews\\_detail.cfm?ID=2788](http://site.pga.com/newsline/industry_news/industrynews_detail.cfm?ID=2788) (May 3, 2002). The number of minority coaches in these professional venues is equally disappointing. And, when considering the ethnic and gender composition of professional sports, it is intriguing that the "power broker" positions continue to be occupied by white males rather than reflecting the changing composition of athletes.

14. Kennedy, *supra* note 6, at 279 ("Although blacks are subject to discrimination in private as well as public places, in comparison to work and school, public spaces may provide blacks the least amount of protection from racial stereotyping and discrimination.").

15. AYRES, *supra* note 1, at chs. 2-3.

16. See *id.* at 88-100 (comparing Penelope Goldberg's survey and article appearing in the Consumer

near Atlanta, Georgia.<sup>17</sup> Professor Ayres begins his credits to the book with the observation that "[c]runching numbers is hard work."<sup>18</sup> What becomes even more difficult is that the numbers presented in *Pervasive Prejudice* yield very little information to the non-economist and non-statistician in terms of correlation, causation, and rectification. There is ample data that discrimination exists — or, under these studies, did exist. What is conspicuously lacking, however, is the necessary chapter that summarizes the data in a user-friendly format so that the premise of the book can be fully considered by the reader.

Yes, the numbers reveal "disparate" bargaining. But, evidence of disparate impact data need not always yield a finding that the observed discrimination is unlawful. In fact, from a legal perspective, disparate impact cases are on the way out. Purposeful or invidious discrimination — something more than just a statistically demonstrated variance in the treatment of individuals, due either to race or gender — is necessary to demonstrate a legally sustainable challenge of discrimination. If the point of Professor Ayres' book is to signal that prejudice remains a common problem in the twenty-first century by setting forth three distinct examples with corresponding statistical evidence, then he has succeeded. One would like to believe, though, that he intended not only to uncover or reveal the pervasive nature of the disparate impact upon minorities in the marketplace but also to buttress his illustrations with something more. One would like to believe that the point of the question mark in the title is to guide his readers through an analysis where the question posed is finally answered or the debate is furthered.

Ayres' effort, however, leads this author to question whether these three examples sufficiently serve the purpose of demonstrating where our laws have failed and are failing. As Professor Ayres himself points out, access to the Internet and other haggle-free systems of purchasing, in large part, have rectified the informational discrepancy in car purchases discussed in the first four chapters.<sup>19</sup> If information and access to information is what perpetuates and insulates the instances of discrimination in purchasing cars, then the solution becomes obvious. This shortcoming in informational exchange does not provide sufficient impetus for full-scale legal reform of civil rights laws as proposed by Professor Ayres in chapter 5.<sup>20</sup> This unfortunate bargaining discrepancy, and its attendant discriminate impact, are perhaps not capable of rectification through the expansion of civil rights laws.

As Professor Ayres' himself seems to indicate, the improved notion of Internet communication and the movement toward no-haggling transactions with car dealerships leads to the disappointing conclusion that the first five chapters carry very little force or effect. If the solution in this one arena is already occurring, or at least marked progress is occurring, then why would society undertake any effort

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Expenditure Survey, 104 J. POL. ECON. 622 (1996)). Ms. Goldberg's survey considered approximately 1,300 new car purchasers randomly selected throughout the nation. *Id.* at 92.

17. *Id.* at 100-01 (referencing Edward Buckley's review of salespersons from a single dealership in Conyers, Georgia).

18. *Id.* at ix.

19. *Id.* at 156-60.

20. *Id.* at ch. 5.

to restructure the civil rights laws to embrace a broader vision of "public accommodations"<sup>21</sup> or seek to reinvigorate 42 U.S.C. §§ 1981 and 1982?<sup>22</sup> Law has never provided the panacea to discrimination and prejudice that lawyers, or some lawyers, would desire.<sup>23</sup> These laws are simply not structured to do so. Rather, buyers should be informed and educated of their many options. The "invisible hand" in the marketplace will do the rest. Furthermore, despite the seminal public accommodation cases involving Heart of Atlanta Motel<sup>24</sup> and Ollie's Barbeque,<sup>25</sup> persons of color continue to find it difficult to access dining options that *are protected* under law.<sup>26</sup> Increased legal protections may only lead to increased legal disappointments.

Broadening the net to include additional offenses likely will not have the desired effect of ceasing the offenses. Rather, broadening the categories of "public accommodation" will simply lead to more numerous cataloging of offenses. Change in the law might not, and probably will not, provide the desired change in treatment, or promote diminishment of the statistically demonstrable disparity that Professor Ayres desires. The solution to race and gender inequity will require compliance with *existing law* — both in letter and spirit, not the creation of additional legal protections and quagmires.

The chapter dedicated to renal transplantation, misguidedly entitled, "Unequal

21. Title II, section 201(a) of the Civil Rights Act of 1964 provides in pertinent part: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a (1994). Thereafter, section 201(b) lists four categories of "public accommodation" that, although are private business enterprises, are required to refrain from purposeful race discrimination. *Id.*

22. The obvious advantage to relying on either a § 1981 or § 1982 cause of action is that these federal statutory provisions do *not* require state action. Both §§ 1981 and 1982 directly apply to private parties. See generally *City of Memphis v. Greene*, 451 U.S. 100 (1981).

23. Kennedy, *supra* note 6, at 306 (critiquing the current narrow application of § 1981 lawsuits). I strongly agree with Professor Kennedy that courts have improperly construed § 1981 litigation with such a narrow interpretation that the existing law becomes almost meaningless for racial minorities who have been discriminated against in the marketplace. Thus, the preferred approach, in my opinion, should be to reconsider our current constricted interpretation of § 1981 lawsuits and embrace the spirit of the law as it was intended. Section 1981, as it exists, should provide ample protection were it to be accurately and more broadly construed. The shortcoming appears to be judicial interpretation of the statute, not lack of statutory protections. On this point, I would recommend simply that there be a renewed effort to educate courts on the proper interpretation of § 1981 — particularly in light of the many cases and instances recorded by Professor Kennedy in her thoughtful article.

24. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (affirming that Congress can utilize the Commerce Clause to pass legislation — Title II of the Civil Rights Act of 1964 — to eradicate purposeful race discrimination from the marketplace).

25. *Katzenbach v. McClung*, 379 U.S. 294 (1964). The *McClung* Court applied the Commerce Clause-based public accommodation legislation to a local family-owned Birmingham, Alabama, restaurant that prohibited blacks from using the dining room facilities. The law reached Ollie's Barbeque under the Commerce Clause because 46% of the food items Ollie's purchased from a local supplier had moved in interstate commerce. *Id.* at 296-97.

26. Stephen Labator, *Denny's Restaurants to Pay \$54 Million in Ruce Bias Suits*, N.Y. TIMES, May 25, 1994, at A1; see also RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATION: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES (2001).

Racial Access to Kidney Transplantation," is the most controversial component of Professor Ayres' argument regarding disparate treatment against minorities.<sup>27</sup> It is at this point that I believe Professor Ayres' is speaking out of turn. Doctors, those trained to administer and treat individuals suffering from kidney disease, have greater understanding and a much superior vantage point from which to consider transplantation issues — both in terms of qualifications for recipients and in terms of "economic" distribution.<sup>28</sup> Lawyers or economists should only attempt to allocate medical resources after thoroughly investigating the medical issues involved.

The arguments that Professor Ayres raises against the current allocation system are not based on solid, uncontroversable legal or medical grounds. It is certainly compelling to note that a greater percentage of blacks are seemingly denied "access" to transplantation because the criteria for matching foreign cadaver-based organs with recipients excludes black recipients at a higher rate than their white counterparts. However, this "disparate impact" is not evidence of the pernicious type of discrimination that our laws and legal system are entrusted to protect. Rather, there appears to be strong medical and immunological basis for the disparity in treatment.<sup>29</sup> If the data later reveals that there is purposeful or invidious discrimination in the allocation of these scarce resources, then the current tissue-based system should be discarded. It is difficult to discern, from reviewing the information presented by Ayres, whether that time has yet arrived.

The kidney transplant example underscores the distinction in law between discriminatory impact and discriminatory treatment or intent.<sup>30</sup> Yes, there appears to be a distinction between black and white recipients of kidney transplants. These numbers are presented by Ayres' in a manner to cause a strong visceral reaction. Indeed, they do. Yet, there does not appear to be any evidence — at least any evidence proffered by Professor Ayres in *Pervasive Prejudice* — of discriminatory

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27. AYRES, *supra* note 1, at ch. 6.

28. See Fred P. Sanfilippo, M.D., et al., *Factors Affecting the Waiting Time of Cadaveric Kidney Transplant Candidates in the United States*, 267 JAMA 247, 252 (1992) ("Since organ transplantation is only possible with public confidence and a willingness to voluntarily donate organs, future modifications of the distribution algorithm in the United States to achieve the stated goal of equitable access for all transplant candidates should be considered an issue of public health policy as well as one of scientific judgment or medical practice.").

29. *Id.* at 248-51.

30. Under Professor Ayres' approach, the question becomes one of state action as opposed to private acts of discrimination. Case law has consistently reminded us that courts "have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a discriminatory impact." *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); see also *Pers. Admin. of Mass. v. Feeny*, 442 U.S. 256 (1979) (involving claims of gender discrimination). The *Feeny* Court stated:

The cases of *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results.

*Id.* at 273.



treatment in a legal sense. In fact, an honest review of the materials suggests that there are many medically supportable justifications for the current allocation system.<sup>31</sup> Disagreement with this system is permissible from an ethical, sociological, and, perhaps, medical perspective, and should be raised in the appropriate settings. Such disagreement, however, should not be asserted as a component of "pervasive prejudice" in a race discrimination analysis unless there is forceful evidence that the medical community is excluding an entire race from competing on equal grounds for scarce resources without adequate medical justification.<sup>32</sup>

Professor Ayres' solutions to renal transplantation disparity such as "first-come, first-serve"<sup>33</sup> and eliminate the O blood-type category for preferential treatment may suffice in a legal article, but may be irrelevant in the medical community.<sup>34</sup> Further, from an economic perspective, there are important "opportunity costs," which are not race-based, to be considered when seeking the best and most efficient use of scarce resources.<sup>35</sup> Projected length of survival with the transplanted kidney is an absolute consideration that should be made under both medical and economic "opportunity costs" terms. Race, as an artificial variable, when tissue-typing and blood-typing are the more relevant data, conflates issues of race discrimination in a dangerous and disingenuous manner.<sup>36</sup> The "accident of birth" protection that

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31. Sanfilippo et al., *supra* note 28.

32. The more appropriate criticism may be leveled against the medical community at large for not yet fully including African Americans and other minorities in positions of power. *See supra* notes 11-12 (critiquing the continued exclusion of blacks and women from the ranks of legal and medical academia). One possible cure to the disparities that both blacks and women face in receiving medical care would be to more fully include and embrace these minorities in powerful decision-making positions in the medical community. It would be ideal to see African American representation on any committee or study that reviews the issue of renal transplantation.

I wholeheartedly agree with Professor Ayres that more must be done to ensure that blacks and other minorities are not excluded from the receipt of proper medical care. The more advantageous legal argument for ensuring that blacks are not systematically excluded from renal transplantation without medical justification would be to consider claims under Title VI of the 1964 Civil Rights Act (a federal law requiring that all medical facilities receiving federal funds refrain from discrimination based on race, color, or national origin). *See generally* Cara A. Fauci, *Racism and Health Care in America: Legal Responses to Racial Disparities in the Allocation of Kidneys*, 21 B.C. THIRD WORLD L.J. 35, 61-66 (2001).

33. AYRES, *supra* note 1, at 169.

34. *See generally* Sanfilippo et al., *supra* note 28. This article reflects the work of at least six medical doctors who directly refute Professor Ayres' "first-come, first-serve" solution as "untenable for practical reasons of immune sensitization and blood group compatibility. Moreover, consideration of equitable access without anticipated outcome may have an overall negative impact for all patients waiting for transplantation if the result is an increase in the number of organs lost to rejection or nonfunction." *Id.* at 252.

35. *Id.*

36. *Id.* at 250-51. The authors state:

[T]he overriding factors that contributed to the time a patient waited for cadaveric renal transplantation were immunologic. Since performed alloantibodies to donor HLA antigens, as well as natural isohemagglutinins against incompatible donor ABO antigens, provide a high risk of hyperacute kidney graft rejection, these factors play a critical role in recipient

Justice Brennan speaks of in terms of race and gender distinction<sup>37</sup> was not intended to stretch to such transmogrified limits.<sup>38</sup>

In the kidney transplantation chapter and those surrounding it, I think that *Pervasive Prejudice* fails to live up to its potential.<sup>39</sup> It is true and worthy of memorialization that race and gender discrimination continue to permeate many facets of society. Yet, there are increasing opportunities for women and persons of color to access much needed information to stave off and combat instances of marketplace discrimination. Likewise, there are greater and greater opportunities for minorities to penetrate the once sacred halls of academia in law and medicine. The face of our country is changing. But, change occurs slowly.<sup>40</sup> Where I disagree most vehemently with Professor Ayres is whether more laws and legal reforms proffer the best solution to the isolated quandaries he presents. Standing alone, the law does not provide the solution for daily occurrences of race and gender discrimination. In fact, women are still waiting to receive the same level of judicial review or judicial scrutiny for cases involving gender discrimination that blacks receive.<sup>41</sup> Thus, law only provides us with one piece of the puzzle, not a panacea.

selection. Thus, differences in distribution of ABO and HLA antigens between blacks and whites result in a biologic disadvantage to blacks, who represent a relatively higher percentage of recipients than donors. This could be substantially overcome by increased organ donation from blacks.

*Id.*

37. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). In *Frontiero*, the appellants argued, ultimately unsuccessfully, that claims of gender discrimination should be assessed under a strict scrutiny analysis like race because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . ." Justice Brennan deemed discrimination based on these immutable traits particularly suspect because "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concepts of our system that legal burdens should bear some relationship to individual responsibility.'" *Id.* (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)). However, as the case remains, claims of gender discrimination are not reviewed under strict scrutiny, as other suspect classifications generally are, but rather under a lessened standard of review known as "mid-tier" review. See *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

38. See Sanfilippo et al., *supra* note 28, at 248. The authors state:

Factors that had the strongest association with increased waiting time [for all renal transplantation recipients] were, in rank order, recipient O blood type, PRA levels greater than 80%, recipient B blood type, PRA levels equal to 21% through 80%, local kidney recovery rate of 28 to 35 per million population, local kidney recovery rate of less than 28 per million population, and prior transplantation.

*Id.* This finding casts doubt on Professor Ayres' suggestion that the special categorical exemption for type O transplant candidates is unnecessary. In fact, the evidence set forth in the JAMA article explains that type O candidates may necessitate unique characteristics that are unrelated to race and to other non-immunologic criteria. *Id.*

39. For a thorough, user-friendly statistical analysis of gender discrimination in the courts, see The Gender Bias in the Courts Task Force, October 2000, *Gender Bias in the Courts of the Commonwealth Final Report*, 7 WM. & MARY J. WOMEN & L. 705 (2001).

40. While this country still awaits the first black, woman, or Jewish individual to fill the prestigious positions of either president or vice-president, we are making progress. The last two secretaries of state have been, respectively, a woman (Madeleine K. Albright) and an African-American male (Colin L. Powell).

41. See *Craig v. Boren*, 429 U.S. 190 (1976). The *Craig* Court limited the judicial scrutiny of

Rather, the only lasting solutions to race- and gender-based discrimination can be found in minorities assuming positions of power and financial independence. Only when black men and women of all races become powerful participants in the marketplace will discrimination begin to diminish. Very little, if anything, in the statistical shortcomings highlighted in Professor Ayres' book can be corrected via legislative or judicial reform. Furthermore, such legislative solutions only yield greater resistance from those who the minority-based laws oppress — usually white males.<sup>42</sup> Rather than suffer additional backlash and numerous justifications for discriminatory legislation, it is time to face the greater issue — monetary- and power-based inferiority. When we can look at our leadership in this country, our educational system, our police force, our judiciary, and our medical units and see a true reflection of our society, then, and only then, will we be able to eradicate pervasive prejudice. Until then, there will be many victims fighting for the better car deal, the right to receive adequate medical treatment, and the right to be seen before the judicial system as a person separated from their race and gender. It was truly the desire of Martin Luther King, Jr., for each of us to be seen for who we are, beyond our obvious physical characteristics, rather than who we at first glance appear to be.<sup>43</sup> Thus, although Professor Ayres' book raises interesting issues, it

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gender-based discrimination to "mid-tier" review. Under the mid-tier test, laws making classifications based on gender will only be deemed unconstitutional when they fail to "serve important governmental objectives [that are not] substantially related to achievement of those objectives." *Id.* at 197. This middle level of review should be contrasted with other categories, such as race, religion, and national origin that receive true "suspect class" status and whose claims are reviewed under the most demanding "strict scrutiny" review. But, even here, change may be occurring. See *United States v. Virginia*, 518 U.S. 515 (1996). In *United States v. Virginia*, Justice Ginsburg attempts to raise the standard of review for gender-based claims to something more searching than "mid-tier" by requiring that courts reviewing classifications based on gender "determine whether the proffered justification [for the law] is 'exceedingly persuasive.'" Justice Ginsburg articulates the test to evaluate gender-based classifications as follows:

Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and rests entirely on the State. [Accordingly], the State must show "at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" [In addition], [t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And [the justification for the law] must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

*Id.* at 532-33 (citations omitted) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

42. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Only Justice Rehnquist has noted that white men should perhaps not benefit from the laws instituted to protect traditionally excluded and disempowered minorities. See *Craig v. Boren*, 429 U.S. 190, 217-28 (1976) (Rehnquist, J., dissenting). Yet, many seminal gender discrimination cases were successfully brought by white males. It is ironic that in the year 2000, some members of the Supreme Court still believed that although white men could go to nursing school (the *Hogan* case), women should not be permitted to penetrate the sacred halls of a state military institution because it would either be too arduous for women to tolerate or too difficult to fully bring women into such an environment without, essentially, ruining it for the guys. See *United States v. Virginia*, 518 U.S. 515, 566-603 (1996) (Scalia, J., dissenting).

43. MARTIN LUTHER KING, JR., *I HAVE A DREAM* 101 (James Melvin Washington ed., 1996) (cataloguing many of Martin Luther King, Jr.'s renowned speeches and writings).

proffers unworkable solutions to the problems confronting racial and gender minorities. His unconventional evidence is insufficient to reap tangible benefits for future generations.

This laudable effort is, in the final analysis, difficult for the non-economist and non-statistician to decipher and/or apply to daily instances of discrimination. There is far too much detail in the how and why of the numerous statistics presented and far too little relating to how we deal with what the numbers convey. Nonetheless, if only to continue this important dialogue, Professor Ayres raises important considerations for a culture where prejudice is truly pervasive. Prejudice and its attendant forms of discrimination remain ubiquitous in our daily lives, and, as Professor Ayres observes, the current legal structure has not combated or sufficiently curtailed discrimination in the marketplace. Could laws be drafted to eradicate these subtle and not so subtle forms of discrimination? If so, should they even be attempted? What are the opportunity costs of pursuing such avenues?

It is in raising these questions that Professor Ayres may prove to have an impact on the pervasive prejudice he describes. For it is through awareness, education, and constant vigilance that societies conquer the destructive patterns of discrimination.

